Supreme Court, U.S.
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No. 93-1124

In the Supreme Court of the United States

OCTOBER TERM, 1993

ARKANSAS PEACE CENTER, ET AL., PETITIONERS

v.

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a suit claiming that a response action carried out pursuant to Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9604, violated an incinerator performance standard promulgated by the Environmental Protection Agency pursuant to the Resource Conservation Recovery Act of 1976, is a "challenge" to the response action, and consequently barred by Section 113(h) of CERCLA, 42 U.S.C. 9613(h), until the action is completed.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 999 F.2d 1212. The orders of the district court (Pet. App. 16a-33a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1993. A petition for rehearing was denied on August 30, 1993 (Pet. App. 3a). On November 22, 1993, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including January 7, 1994. The petition was filed on January 7, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves the Vertac Site in Arkansas at which herbicides were manufactured over a period of 35 years. As part of the manufacturing process, wastes containing low concentrations of dioxin were produced, put into drums, and stored. In 1987, the manufacturer abandoned the Site, leaving behind 28,000 drums of waste. Soon thereafter, the Environmental Protection Agency (EPA) used its authority under CERCLA to stabilize the remaining drums and to place them in temporary storage. Pet. App. 4a. Since the waste was both corrosive and flammable, this storage did not provide a long-term solution. Incineration under appropriately rigorous conditions was chosen as the preferred method for permanent removal of the large quantity of dioxin-containing wastes.[1]

The Arkansas Department of Pollution Control and Ecology (ADPC&E) contracted with a joint venture known as Vertac Site Contractors (VSC) to conduct the incineration. The project was funded with money from a trust fund established under earlier litigation against the manufacturer. Pet. App. 4a.[2] VSC

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[1] For a discussion of the appropriateness of incineration as a treatment method for dioxin-containing wastes, see *Final Rule: Hazardous Waste Management System; Dioxin-Containing Wastes*, 50 Fed. Reg. 1978, 1990-1991 (1985).

[2] EPA determined to conduct incineration support activities (air monitoring, drum handling, and removal and disposal of the incinerator ash) under authority of CERCLA Section 104, 42 U.S.C. 9604. Pet. App. 4a. EPA conducted an Engineering Evaluation/Cost Analysis concerning these activities, which was subject to a 30-day public comment period, immediately followed by a public meeting in Jacksonville. A summary of

erected a rotary kiln incinerator, and on January 2, 1992, ADPC&E certified that VSC had successfully demonstrated its ability to meet applicable state and federal regulatory requirements. Pet. App. 5a. In doing so, ADPC&E imposed numerous conditions on VSC's incineration operation.

2. The particular EPA requirement that has been at issue in this case provides that an incinerator burning certain dioxin-containing wastes must demonstrate a destruction and removal efficiency (DRE)[3] of 99.9999% (the "six 9s" standard) on surrogate constituents more difficult to incinerate than dioxin, but not on dioxin itself. 40 C.F.R. 264.343(a)(2).[4] See Pet. App. 5a. In the 1985 rulemaking which set this

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the nature of the comments received, and responses thereto, is in the record as Plaintiff's Exh. 22. See C.A. App. 1738-1741 (containing an excerpt of PX. 22).

[3] Destruction and removal efficiency (DRE) is defined in 40 C.F.R. 264.343(a)(1) by the following formula: DRE = 100% x (waste in minus waste out)/(waste in), where "waste in" is the mass feed rate of the pertinent constituent in the waste stream fed into the incinerator and "waste out" is the mass emission rate of the same constituent present in exhaust emissions prior to release to the atmosphere.

[4] EPA promulgated this regulation under the authority of Section 3004(a) of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6924(a), which authorizes the Administrator to promulgate requirements for owners and operators of facilities for the treatment, storage or disposal of hazardous wastes "as may be necessary to protect human health and the environment." RCRA also authorizes EPA to approve state hazardous waste programs to operate in lieu of the federal RCRA program. 42 U.S.C. 6926(b). Arkansas has adopted EPA's incinerator performance standards by reference in its EPA-approved hazardous waste program. See ADPC&E Regulation No. 23 (Hazardous Waste Management), ch. 2, § 3.

standard, EPA concluded that, because of the small concentrations of isomers of dioxins and furans in wastes, it is "not possible to measure and calculate a six 9s DRE * * * with the needed accuracy." 50 Fed. Reg. 1991 (1985). Accordingly, EPA required that compliance be demonstrated by performing a trial burn on "a surrogate Principal Organic Hazardous Constituent (POHC) that is more difficult to incinerate" than dioxin, rather than on dioxin itself. *Ibid.*

3. In response to concerns expressed by environmental groups, EPA reviewed the State's approval of the Vertac incinerator and agreed that VSC was in compliance with the applicable federal standard. EPA noted that 40 C.F.R. 264.343(a)(2) requires that incinerators burning dioxin wastes demonstrate compliance with the six 9s standard, "in a trial burn, using a compound that is more difficult to destroy than dioxin," and that "[d]uring all three trial burn runs, the incinerator achieved a destruction efficiency of over 99.9999 percent" for hexachlorobenzene, which is "more difficult to destroy than dioxin." C.A. App. 2013. The ADPC&E, in consultation with EPA, imposed emission limits on the incinerator, and EPA has conducted continuous air quality monitoring during operation of the incinerator. Pet. App. 6a. The air monitoring has shown that emissions from the incinerator have not exceeded allowable levels. C.A. App. 2134. EPA has also performed a detailed site-specific risk assessment utilizing extensive air monitoring data. See *id.* at 2347-2510.

4. Because the trust fund was insufficient to complete the incineration, EPA Region VI determined in September of 1992 to complete the incineration pur-

suant to Section 104 of CERCLA. Pet. App. 6a.[5] On October 28, 1992, petitioners filed their complaint in the United States District Court for the District of Arkansas, seeking to enjoin the State, EPA and the contractor from incinerating the drummed waste at the Site. The central allegation of the complaint was that the contractor had allegedly failed to demonstrate that the incinerator could destroy 99.9999% of the dioxin present in the waste. C.A. App. 28-29.

On October 30, 1992, the district court granted in part petitioners' request for a Temporary Restraining Order. Pet. App. 16a-17a. The court's order enjoined further burning of the higher concentration "T wastes" at the Site. *Id.* at 7a.

On December 24, 1992, EPA filed a motion to dismiss, pointing out several jurisdictional defects. EPA pointed out, inter alia, that Section 113(h)(4) of CERCLA bars judicial consideration of citizen's suits challenging EPA's planned CERCLA removal action, until that action is "taken" or "secured," *i.e.*, completed. 42 U.S.C. 9613(h)(4). This motion to dismiss was briefed, but was not acted on by the district court. Pet. App. 7a.

On February 16, 1993, the district court amended its temporary restraining order, extending it to prohibit incineration of all dioxin-containing wastes at the Site. Pet. App. 18a-19a. The court interpreted

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[5] With regard to this decision, EPA conducted a public comment period, properly noticed in the Jacksonville, Arkansas newspaper, from March 17, 1993 to April 16, 1993. EPA received no comments during this period. As the court below noted (Pet. App. 9a), EPA took over supervision of the incineration from the State when the trust fund ran out in June of 1993.

EPA's incinerator performance regulation as requiring a 99.9999% destruction and removal efficiency demonstration on dioxin itself. *Id.* at 19a. The court certified the regulatory interpretation issue for interlocutory appeal under 28 U.S.C. 1292(b). Pet. App. 18a. On March 2, 1993, the court of appeals granted motions for interlocutory appeal, and issued a stay pending appeal. *Id.* at 8a.

On March 17, 1993, the district court entered a preliminary injunction barring all defendants from incinerating drums of hazardous wastes at the Vertac Site. Pet. App. 30a. The court found that petitioners had shown a probability of success on the merits because "defendants have not demonstrated that the incinerator can achieve a 99.9999% DRE on dioxin itself as is required by 40 C.F.R. 264.343." *Id.* at 29a. Defendants appealed from the preliminary injunction, and the court of appeals entered further stays on March 17 and April 2, 1993. *Id.* at 8a.

On July 14, 1993, the court of appeals reversed the preliminary injunction and remanded with directions to dismiss the case for lack of subject matter jurisdiction. Pet. App. 15a. The court found that the language of Section 113(h) of CERCLA, 42 U.S.C. 9613(h), showed that citizen suits challenging a removal or remedial action taken under CERCLA Section 104 were barred "until the action has been 'taken' or 'secured'—in other words, completed." Pet. App. 11a. The court noted that "[o]ther courts have consistently held that challenges to remedial actions based on violations of other statutes, including RCRA, are barred under section 113(h)." *Id.* at 12a. The court rejected petitioners' contention that suits to enforce requirements under RCRA could proceed

despite the jurisdictional bar found in Section 113(h). The court distinguished the decision in *United States* v. *Colorado*, 990 F.2d 1565 (10th Cir. 1993), cert. denied, 114 S. Ct. 922 (1994), on grounds that the holding in that case was expressly limited to attempts by a State to enforce its hazardous waste requirements. Pet. App. 13a.

The court of appeals further stated that "if we were free to consider the merits of this appeal, we would entertain no doubt that the district court erred in its reading of 40 C.F.R. § 264.343." Pet. App. 14a. The court found that the language of the regulation and EPA's explanation in the preamble to the regulation were clear that the 99.9999% standard must be demonstrated on a surrogate that is harder to burn than dioxin, not on dioxin itself. *Id.* at 15a.

ARGUMENT

Section 113(h) of CERCLA imposes a jurisdictional limit on the manner and timing of federal district court challenges to CERCLA response actions.[6] That Section provides that no federal court shall have jurisdiction to review "any challenges to removal or remedial action" selected under CERCLA except through five specific avenues. 42 U.S.C. 9613(h). Subsection 113(h)(4) allows an action under CERCLA's citizen suit provision, Section 310, 42

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[6] Response actions include, generally, relatively short-term "removal" actions and more permanent "remedial" actions. 42 U.S.C. 9601(23)-(25). The term "removal" specifically includes "the disposal of removed material." 42 U.S.C. 9601(23). A "remedial action" includes "those actions consistent with a permanent remedy taken instead of or in addition to removal actions." 42 U.S.C. 9601(24).

U.S.C. 9659, but only once the response action has been "taken" or "secured." 42 U.S.C. 9613(h)(4).

As the court of appeals noted (Pet. App. 11a-12a), the lower courts have consistently held that by using the past tense (*i.e.*, the words "taken" or "secured") in Section 113(h)(4), Congress demonstrated its intent that the response action actually be completed before a citizen suit may be filed. See *Alabama* v. *EPA*, 871 F.2d 1548, 1557 (11th Cir.) ("The plain language of the statute indicates that section 113(h)(4) applies [to confer jurisdiction] only after a remedial action is actually completed."), cert. denied, 493 U.S. 991 (1989); *Schalk* v. *Reilly*, 900 F.2d 1091, 1095 (7th Cir.) ("The obvious meaning of this statute is that when a remedy has been selected, no challenge to the cleanup may occur prior to completion of the remedy."), cert. denied, 498 U.S. 981 (1990); *Neighborhood Toxic Cleanup Emergency* v. *Reilly*, 716 F. Supp. 828, 834-835 (D.N.J. 1989) (Section 113(h)(4) prohibits review through citizen suits until the remedial action selected is completed). See also 132 Cong. Rec. 29,736 (1986) ("The phrase '[t]aken or secured' as used in this section means that no person may bring any lawsuit in Federal court regarding a federally approved removal or remedial action except when the removal action has been completed or when the remedial action has been taken or secured.") (statement of Rep. Glickman).[7]

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[7] Cases involving suits by potentially responsible parties have reached the same conclusion that Congress intended to bar lawsuits that would delay cleanups at Superfund sites. See, *e.g.*, *North Shore Gas Co.* v. *EPA*, 930 F.2d 1239, 1244 (7th Cir. 1991) (challenges under RCRA and the National Environmental Policy Act to remedial action are "blocked by the blunt

1. Petitioners initially try to avoid the bar of Section 113(h) by contending that "an attempt to ensure that a cleanup will be conducted in compliance with RCRA and other public health standards and will not cause serious harm to public health is not a challenge to the response action." Pet. 21. But as the courts have recognized, suits alleging that cleanups do not comply with other statutes, such as RCRA, are the precise type of "challenges" that are deferred by Section 113(h) until the cleanup is completed. See *North Shore Gas Co.* v. *EPA*, 930 F.2d at 1244 (challenges under RCRA and the National Environmental Policy Act are barred by Section 113(h)); *Boarhead Corp.* v. *Erickson*, 923 F.2d 1011, 1024 (3d Cir. 1991) (Section 113(h) deprives district court of power to hear claims "under the [National Historic] Preservation Act, or any other statute, that would interfere with EPA's clean-up activities on a Superfund site"); *Reynolds* v. *Lujan*, 785 F. Supp. 152, 153-154 (D.N.M. 1992) (Section 113(h) bars RCRA claims until cleanup completed).

Petitioners (Pet. 23) attempt to distinguish their situation from this consistent line of authority by focusing on language in the citizen suit provision of RCRA. Section 7002(a)(1)(B) of RCRA authorizes

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withdrawal of federal jurisdiction in section 113(h)"); *Voluntary Purchasing Groups, Inc.* v. *Reilly*, 889 F.2d 1380, 1388 (5th Cir. 1989) ("it is clear that CERCLA explicitly limits judicial review of remedial and removal plans where such review will delay cleanup"); *Solid State Circuits, Inc.* v. *EPA*, 812 F.2d 383, 386 n.1 (8th Cir. 1987) (Court "agree[d] with the district court's decision that it lacked jurisdiction to review the merits of an EPA clean-up order [under CERCLA Section 106] prior to an attempt by EPA to enforce it").

suit against "any person, including the United States, * * * who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. 6972(a)(1)(B). Subsections 7002(b)(2)(B) and (C) withdraw this cause of action where either the federal or state government uses either RCRA or CERCLA authority to address the endangerment created by the defendant. 42 U.S.C. 6972(b)(2)(B) and (C). Petitioners draw the unwarranted implication that this is the only limitation Congress intended to place on RCRA citizen suits which may affect CERCLA cleanups. Thus, they argue, since Congress did not place a similar limitation on RCRA citizen suits which allege violations of permits, standards, or regulations, see 42 U.S.C. 6972(a)(1)(A), Congress must have intended that such suits could go forward even in cases where they might interfere with a CERCLA cleanup.[8]

Petitioners' broad conclusion does not follow from the limiting language of RCRA Section 7002(b)(2)(B) and (C). This limitation simply shows that Congress did not want a citizen suit under that Section, which is directed at persons who have contributed to the creation of "an imminent and substantial endanger-

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[8] The court of appeals did not address this particular argument since petitioners primarily relied below upon a different theory, *i.e.*, that the cleanup at the Vertac Site was not being carried out pursuant to CERCLA. See Appellees' C.A. Br. 28-29. The court of appeals rejected this theory (Pet. App. 13a-14a) and petitioners have not pursued it in their petition.

ment," to interfere with governmental efforts to address the situation. The language in no way suggests that Congress intended to tolerate suits that challenge the cleanup action itself. That type of challenge is addressed directly by CERCLA Section 113(h), which was enacted two years after the RCRA provisions relied upon by petitioners. Such a challenge to a removal or remedial action under CERCLA is barred until the action in question is "taken" or "secured." The fact that Section 113(h) applies to "*any* challenges to removal or remedial actions" is fatal to petitioners' arguments. 42 U.S.C. 9613(h) (emphasis added).[9]

2. Petitioners rely heavily on *United States* v. *Colorado*, 990 F.2d 1565 (10th Cir. 1993), cert. denied, 114 S. Ct. 922 (1994), to support their argument that a RCRA citizen suit is not a "challenge" to a removal or remedial action. As we pointed out in our petition in *Colorado* (U.S. Pet. in No. 93-786 at 18, 20-21), the Tenth Circuit's holding that the State's enforcement of a compliance order was not a "challenge" to the remedial action in that case was inconsistent with the plain language of the statute, and conflicted with cases such as *Boarhead Corp.* v. *Erickson* and *Schalk*

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[9] As Representative Glickman, a member of the Conference Committee on the Superfund Amendments and Reauthorization Act of 1986, observed regarding Section 113(h):

> The timing of review section covers all lawsuits, under any authority, concerning the response actions that are performed by EPA * * * . The section also covers all issues that could be construed as a challenge to the response, and limits those challenges to the opportunities specifically set forth in the section.

132 Cong. Rec. 29,735 (1986).

v. *Reilly*. In addition, we noted that the Tenth Circuit's decision created a conflict of greater "practical significance" with the Sixth Circuit's decision in *United States* v. *Akzo Coatings of Am., Inc.*, 949 F.2d 1409 (1991). U.S. Pet. in No. 93-786 at 18. *Akzo Coatings* held that a State could not bypass CERCLA's "ARARs"[10] process and apply its environmental standards independently of CERCLA. The question whether a State can bypass the ARARs process is not presented here; indeed, Arkansas has consistently supported the incineration remedy at the Vertac site. In this respect, there would appear to be less reason for granting review in this case than there was in *Colorado*.

Moreover, if the decision below is any indication, courts may simply read the anomalous decision in *Colorado* narrowly. See Pet. App. 13a (noting that "[t]he Tenth Circuit limited its holding to an action brought by a state, and distinguished *Schalk* on the ground that *Schalk* was a citizen action"). Moreover, the court in *Colorado* opined that the State "does not seek to halt the Army's Basin F interim response action * * * [and] is not seeking to delay the cleanup." 990 F.2d at 1576. While we disagreed with that

[10] The "ARARs" process derives from CERCLA Section 121(d)'s requirement that a remedy achieve the level of cleanup specified pursuant to "applicable" or "relevant and appropriate" requirements under federal or state environmental law. 42 U.S.C 9621(d). To the extent practicable, "[f]und-financed removal actions under CERCLA section 104 and removal actions pursuant to CERCLA section 106 shall * * * attain [compliance with ARARs]." 40 C.F.R. 300.415(i). Through the ARARs process, States are given an extensive role in the development, selection, and enforcement of the CERCLA remedy. See 42 U.S.C. 9621(d)-(f).

characterization of the facts in *Colorado*, it nonetheless highlights that this case falls squarely within the bar of Section 113(h). Petitioners here sought to stop the selected remedy (incineration) from proceeding, and that is precisely what the district court ordered (see Pet. App. 30a). Moreover, as the district court recognized, under petitioners' reading of the regulation it would probably never be possible to demonstrate that an incinerator has achieved a 99.9999% DRE on dioxin itself. See Pet. App. 23a ("the Court must conclude[] that defendants have not, and probably cannot, demonstrate 99.9999% DRE on dioxin").[11] Thus, petitioners effectively challenged the choice of incineration as an appropriate method for disposing of dioxin-contaminated wastes. That sort of challenge is clearly barred by the plain language of Section 113(h) until the removal or remedial action has been "taken" or "secured."[12]

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[11] As EPA explained in the preamble to the 1985 regulation (50 Fed. Reg. 1991):

> [D]etermining compliance with a six 9s DRE * * * standard for these wastes would be very difficult, if not impossible, without a system for surrogate POHCs as established in § 264.342. The concentrations of the [dioxins and furans] in these wastes are too low to find measurable amounts in the stack gas (at six 9s DRE) at present limits of detection, and public health considerations preclude, in most cases, "spiking" the waste with higher concentrations of [dioxins and furans].

[12] Petitioners point (Pet. 16-17) to the Tenth Circuit's discussion of the RCRA citizen suit provision, 42 U.S.C. 6972, as establishing that "there can be no question that the claims asserted by petitioners could be brought in the Tenth Circuit." The Tenth Circuit simply suggested in *dictum* that "Colorado

3. Petitioners misapprehend the nature of the decision below by stating (Pet. 26) that it embodies a conclusion that "CERCLA completely extinguishes RCRA's public health protections * * *." To the contrary, the RCRA standards for incinerators, as substantive federal regulations which have been incorporated into Arkansas law, do apply in this case as ARARs. See CERCLA Section 121(d)(2)(A)(ii), 42 U.S.C. 9621(d)(2)(A)(ii) (applying legally applicable state standards to "remedial actions"); 40 C.F.R. 300.415(i) (state standards apply to "[f]und-financed removal actions * * * to the extent practicable"); C.A. App. 2530 (identifying 40 C.F.R. Pt. 264 as an ARAR for the removal action in this case). Contrary to petitioners' argument (Pet. 22), CERCLA's ARARs process is designed to ensure that a cleanup is conducted in a manner that protects public health. See Section 121(d)(1), 42 U.S.C. 9621(d)(1) (cleanups must "at a minimum * * * assure[] protection of

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could arguably seek enforcement of the final amended compliance order in federal court pursuant to [42 U.S.C.] § 6972(a)(1)." 990 F.2d at 1578. The court stressed, however, that "we need not decide this issue." *Ibid.* To the extent that this *dictum* suggests that Section 113(h) would not defer a citizen suit claiming that the selected response action at a CERCLA site violates a RCRA provision, it seems clearly wrong. Since it is *dictum*, however, the potential conflict with the decision below does not warrant review at this time.

Petitioners' strained attempt to characterize *Alabama* v. *EPA*, *supra*, as consistent with *Colorado* is plainly misguided. *Alabama*, 871 F.2d at 1557-1559, held that a district court lacked jurisdiction over a citizen suit challenge to an ongoing CERCLA remedial action, and only addressed the merits of the claim as an alternative holding, much like the court below (see Pet. App. 14a-15a).

human health and the environment"). As we noted in our petition in *United States* v. *Colorado*, No. 93-786 (at 7 n.3), "Section 121(d) employs ARARs to provide a comprehensive mechanism for state input in planning the CERCLA response action," and "Section 121(e)(2) expressly allows the States to enforce the ARARs once a remedy is selected." Thus, requirements which have been designated as ARARs apply to CERCLA response actions, but simply cannot be made the basis for a pre-implementation citizen suit challenge to such an action.[13]

4. Petitioners also err in placing reliance (Pet. 22) on the fact that Congress did not evince an intent to bar state law nuisance actions. The pertinent point is that Congress *did* bar federal courts from reviewing preimplementation challenges to removal or remedial actions, which is what petitioners attempted to do here. As this case illustrates, a suit alleging that a selected removal action does not comply with standards promulgated pursuant to RCRA is precisely

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[13] By barring challenges to remedial or removal actions, Section 113(h) simply channels citizens' input into the cleanup process to other times. This approach reflects Congress's judgment that the benefits of citizens' suits in protecting public health are outweighed by the risk created by delaying CERCLA cleanups and the costs of the resulting piecemeal litigation. See 132 Cong. Rec. 28,441 (1986) (statement of Sen. Thurmond). Here, the risks from delaying the removal action are particularly evident: Because of the highly corrosive nature of the wastes, the drums containing the wastes continue to degrade and pose a constant threat of leaking, as well as the even more serious threat of uncontrolled release caused by fire or severe weather. Appellants' C.A. Br. 48.

the type of delaying litigation that Congress sought to avoid.[14]

5. Finally, the substance of the challenge petitioners brought against the incineration was plainly insubstantial. As the court of appeals noted, EPA made clear when it promulgated the regulation in question that the required DRE calculation should be demonstrated on a surrogate that is more difficult to incinerate than dioxin, not on dioxin itself, since dioxin is generally found in very low concentrations. Pet. App. 15a. EPA specifically found in this case that the Vertac incinerator successfully demonstrated a 99.9999% DRE on hexachlorobenzene, and that hexachlorobenzene is "more difficult to destroy than dioxin." C.A. App. 2013. See also Pet. App. 14a-15a. Petitioners have suggested no persuasive reasons to doubt those conclusions. Hence, the judgment

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[14] Petitioners complain (Pet. 22 n.5) that even if their claim based on RCRA regulations is barred at this time, the court of appeals still should not have dismissed their "diversity and state law claims." It is not clear precisely which claims petitioners are referring to. Petitioners did raise a nuisance claim in their complaint, but never pursued that claim, and never informed the court of appeals that they were making a separate nuisance claim. Petitioners should accordingly be held to have waived that undeveloped nuisance claim. Moreover, petitioners did not allege diversity under 28 U.S.C. 1332 as a basis for the court's jurisdiction until an amended complaint filed on July 1, 1993, after oral argument in the court of appeals and just two weeks before the court of appeals decided the case (Pet. App. 3a). In any event, the court of appeals' alleged failure to address petitioners' "diversity and state law claims" is a matter that petitioners should have raised with the court of appeals in their petition for rehearing, yet their petition made no mention of it.

below would be correct even if CERCLA Section 113(h) were not a bar.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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